

This Opinion is not a
Precedent of the TTAB

Hearing: May 17, 2023

Mailed: July 12, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Panini America, Inc.

Serial No. 88960212

Norman H. Zivin of Wolf, Greenfield & Sacks, P.C.
for Panini America, Inc.

Christina Martin, Trademark Examining Attorney, Law Office 103,
Stacy Wahlberg, Managing Attorney.

Before Cataldo, Goodman and Hudis,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Panini America, Inc., filed an application to register on the Principal Register the mark PLAYBOOK (in standard characters) identifying “Collectible trading cards; Sports trading cards” in International Class 16.¹

¹ Application Serial No. 88960212 was filed on June 11, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), asserting March 30, 2012 as the date of first use of the mark anywhere and in commerce.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with the following cited registered marks, owned by the same entity:

PLAYBOOK (in standard characters) identifying "Magazines featuring sports information" in International Class 16;² and

PLAYBOOK (in standard characters) identifying "Providing a website featuring blogs and non-downloadable publications in the nature of magazines and newsletters in the field of sports; Providing a website featuring entertainment information in the field of sports; Providing an Internet sports news portal featuring links to sports news stories and articles in the field of sports; Providing an Internet website portal featuring entertainment news and information specifically in the field of sports information; Providing information, news, and commentary in the field of current events via the Internet" in International Class 41.³

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board.⁴ Applicant and the Examining Attorney submitted briefs and presented arguments at oral hearing. We reverse the refusal to register as discussed below.

² Reg. No. 3221914 issued on the Principal Register on March 27, 2007. Renewed.

³ Reg. No. 5431692 issued on the Principal Register on March 27, 2018.

⁴ All citations to documents contained in the Trademark Status & Document Retrieval (TSDR) database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. *See, e.g., In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018). References to the briefs on appeal refer to the Board's TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable. *See, e.g., New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, *2 n.1 (TTAB 2020). In this case, Applicant's brief and reply brief are located at 8 TTABVUE and 11 TTABVUE. The Examining Attorney's brief is located at 10 TTABVUE.

I. Likelihood of Confusion

We base our determination of likelihood of confusion under Trademark Act Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015); see also *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019).

In making our determination, we consider each relevant *DuPont* factor for which there is evidence and argument, See *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019), and have treated other factors as neutral. See *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) (“Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.”)); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination”). Two key considerations are the similarities

between the marks and the relatedness of the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (the “fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018).

A. Focus on Reg. No. 3221914⁵

For purposes of our likelihood of confusion analysis, we will focus on cited Reg. No. 3221914 for the mark PLAYBOOK (in standard characters) identifying “Magazines featuring sports information” in International Class 16. When this mark and identified goods are considered vis-à-vis the applied-for mark and goods, it is this mark and goods that is most likely to support a finding of likelihood of confusion. Conversely, if likelihood of confusion is not found as to the mark and goods in this registration, we would not find likelihood of confusion as to the mark and goods in the other cited registration. *See, e.g., In re Max Cap. Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010) (“[I]f there is no likelihood of confusion between applicant’s mark and MAX in typed form, then there would be no likelihood of confusion with the MAX and dot design mark.”).

⁵ Hereinafter usually referred to as “cited registration.”

B. Strength of the Cited Mark / Number and Nature of Similar Marks

In determining the strength of the cited PLAYBOOK mark, we consider both its inherent strength, based on the nature of the mark itself, and commercial strength or recognition. *See In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength”). “[T]he strength of a mark is not a binary factor” and “varies along a spectrum from very strong to very weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675-76 (Fed. Cir. 2015) (internal citations omitted).

“The weaker [the registrant’s] mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.” *Id.* at 1676 (internal citations omitted). *See also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 369 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005) (“Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.”).

The fifth *DuPont* factor, the fame of the prior mark, and the sixth *DuPont* factor, the number and nature of similar marks in use for similar goods or services, may be considered in tandem to determine the strength of the cited mark and the scope of

protection to which it is entitled.⁶ See *DuPont*, 177 USPQ at 567; *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017).

Additionally, the Federal Circuit has held that if there is evidence a mark, or an element of a mark, is commonly adopted by many different registrants, that may indicate the common element has some non-source identifying significance that undermines its conceptual and commercial strength as an indicator of a single source. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (“[E]vidence of third-party registrations is relevant to ‘show the sense in which a mark is used in ordinary parlance,’ ... that is, some segment that is common to both parties’ marks may have ‘a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak’”) (quoting *Juice Generation*, 115 USPQ2d at 1674).

Turning first to conceptual strength or weakness, Applicant submitted with its June 22, 2022 Request for Reconsideration⁷ the following definition of PLAYBOOK: “one or more plays in book form; a notebook containing diagrammed football plays; a stock of useful tactics or methods.” PLAYBOOK thus appears to be highly suggestive

⁶ Because the owner of the cited registration is not a party to this appeal, and further because the Examining Attorney is under no obligation to demonstrate the fame of the cited mark, we find the fifth *DuPont* factor to be neutral. *In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006) (fame of the mark in a cited registration is not normally a factor in ex parte proceedings.).

⁷ At 35-38.

of the subject matter of the magazines featuring sports information identified in the cited registration, particularly with regard to football.

As further evidence of the conceptual weakness of the cited PLAYBOOK mark, Applicant submitted with its April 5, 2021 Response to Office action⁸ copies of five live third-party registrations (and one subsequently expired registration) for PLAYBOOK(S) marks identifying a variety of goods, summarized in the chart provided by Applicant below.⁹

<u>Mark</u>	<u>Reg. No.</u>	<u>Int'l Class</u>	<u>Goods</u>	<u>Owner</u>
PLAYBOOK	3938200	28	Lottery tickets	Pollard Banknote Limited Partnership Pollard Banknote Limited

⁸ At 10-20.

⁹ At 8. Because the goods listed in the third-party registrations are not identical or even closely related to the goods identified in the cited registration, these circumstances do not implicate *Spireon, Inc. v. Flex Ltd.*, 2023 USPQ2d 737, at *4-8 (Fed. Cir. 2023).

Reg. No. 3994021 was cancelled under Trademark Act Section 8; 15 U.S.C. § 1058 on November 10, 2021. Therefore, it “is evidence only of the fact that it previously existed.” *UMG Recordings Inc. v. Mattel Inc.*, 100 USPQ2d 1868, 1872 n.2 (TTAB 2011). Any benefits conferred by the registration, including the evidentiary presumptions afforded by Section 7(b) of the Trademark Act, were lost when the registration expired. *See, e.g., Anderson, Clayton & Co. v. Krier*, 478 F.2d 1246, 178 USPQ 46 (CCPA 1973); *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650 (TTAB 2002).

PLAYBOOK	4293103	28	Footballs	Franklin Sports, Inc.
PLAYBOOK	5707280	41	Arranging and conducting youth sports programs	NYC Sports LLC
PLAYBOOKS	6028166	16	Printed matter, namely, paper signs, books, manuals, curriculum, newsletters, informational cards and brochures in the field of children's literature	Playbooks, Inc.
PLAYBOOK	6039916	16	Photograph albums	Finao Online, LLC

We note that, of the five live third-party registrations of record, none recite the goods identified in the cited registration or involved application, only two identify footballs and arranging and conducting youth sports programs, goods and services arguably related to those identified by the registrant in the present case. Both registrations are for the mark PLAYBOOK.

The remaining three third-party registrations for the mark PLAYBOOK or PLAYBOOKS identify lottery tickets, various printed materials in the field of children’s literature, and photograph albums, for which Applicant has not established a similarity with the goods of Applicant and the registrant. These three registrations possess little, if any, relevance bearing on the weakness of the registered mark. *See Omaha Steaks Int’l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”); *In re i.am.symbolic, llc*, 123 USPQ2d at 1751 (disregarding third-party registrations for goods in other classes where the proffering party “has neither introduced evidence, nor provided adequate explanation to support a determination that the existence of I AM marks for goods in

other classes, ... support a finding that registrants' marks are weak with respect to the goods identified in their registrations”).

Based upon the totality of the record evidence, we find that the registered mark is highly suggestive, but nonetheless distinctive, as applied to the identified goods. *See* Trademark Act § 7(b); 15 U.S.C. 1057(b); *Tea Board of India v. The Republic of Tea, Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006) (“A mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods.”).

Applicant further submitted with its November 29, 2021 Response to second Office action¹⁰ screenshots from third-party websites showing use of PLAYBOOK and formatives thereof in relation to:

- an advertisement from Game Crafter for a card game using the rules and regulations of football;
- a newsletter from Green Sports Alliance for an environmental resource for professional and collegiate sports teams to improve and reduce their use of paper;
- a regional newsletter from Palo Alto Online in the field of high school sports and athletics;
- an online guide from DraftKings Nation in the field of fantasy sports and sports betting;
- an advertisement from Forbes for Sports Money Playbook, a newsletter discussing sporting news and financial aspects of sports leagues;
- an advertisement for Gaming Today Playbook, an online sports betting newsletter in the field of sports betting; and

¹⁰ At 13-77. All third-party uses are of PLAYBOOK unless otherwise noted.

- an Instagram post from Playbook Sports Software, a software company offering registration, marketing and analytical tools for local sports organizations to increase community impact.

Four of the above third parties provide paper or online newsletters in the fields of various aspects of sports and sports teams. These four provide goods in the form of newsletters or services in the form of online information related to sports, and thus may be found to provide goods closely related to those identified in the cited registration. In addition, one third party provides a card game modeled on the game of football. One provides online fantasy sports and sports betting information. One provides a software analytics tool to increase the impact local sports have on communities. These three, while offering goods and services less closely related to those identified in the cited registration, nonetheless identify goods and services in the field of sports. Thus, while Applicant's evidence of seven third-party uses is more modest than that found to be determinative in other cases, *Cf., e.g., Juice Generation*, 115 USPQ2d at 1674-75; *Wolfskin*, 116 USPQ2d at 1135-36, they remain relevant to show the relative weakness of Registrant's PLAYBOOK mark.

Viewing the record as a whole, we find that the registered PLAYBOOK mark is entitled to a narrower than usual scope of protection to which highly suggestive but nonetheless distinctive marks are entitled, primarily due to the definition of PLAYBOOK and evidence of third-party use and registration of PLAYBOOK formatives for related goods and services. *See Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017)

(stating that likelihood of confusion fame varies along a spectrum from very strong to very weak).

C. The Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's mark and the registered mark in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion*, 110 USPQ2d at 1160; *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

Applicant's PLAYBOOK mark in standard characters is identical in every respect to the registered PLAYBOOK mark in standard characters. The fact that the marks are identical results in this factor strongly supporting a finding of likelihood of confusion. *In re Shell Oil Co.*, 26 USPQ2d at 1688 ("Without a doubt the word portion of the two marks are identical, have the same connotation, and give the same commercial impression. The identity of the words, connotation, and commercial impression weighs heavily against the applicant.").

Furthermore, "even when goods or services are not competitive or intrinsically related, the use of identical marks can lead to an assumption that there is a common source." *Id.* at 1689. *See also Amcor, Inc. v. Amcor Indus., Inc.*, 210 USPQ 70, 78 (TTAB 1981) (When both parties are using or intend to use the identical designation, "the relationship between the goods on which the parties use their marks need not be

as great or as close as in the situation where the marks are not identical or strikingly similar”).

The first *DuPont* factor thus weighs heavily in favor of finding a likelihood of confusion.

D. The Goods, Channels of Trade, and Classes of Customers

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1159 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). “This factor considers whether ‘the consuming public may perceive [the respective goods or services of the parties] as related enough to cause confusion about the source or origin of the goods and services.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard*, 62 USPQ2d at 1004).

In support of the refusal of registration, the Examining Attorney introduced with the October 6, 2020 first Office action,¹¹ June 1, 2021 second Office action¹² and December 10, 2021 final Office action¹³ printouts from the following third-party websites, offering and advertising “Collectible trading cards; Sports trading cards” or

¹¹ At 10-24.

¹² At 9-31.

¹³ At 8-30.

other trading cards and “Magazines featuring sports information” or other magazines.

- National Geographic Kids offers magazines featuring information on a variety of subjects including sports and “collector’s cards.”
- Sports Illustrated for Kids offers magazines featuring sports information and Collectors.com offers Sports Illustrated for Kids sports trading cards. There is no evidence of record to indicate that Collectors.com is related to Sports Illustrated.
- Pittsburg Steelers offers on its website printed magazines featuring sports information as well as football trading cards, and SportsGifts.com offers Pittsburg Steelers sports trading cards. SportsGifts.com is not related on this record to the Pittsburg Steelers football franchise.
- Ebay offers an Upper Deck brand Lebron James 2003 magazine featuring a “pull-off, 3-D action card of Lebron on its front.” This appears to be a single magazine and there is no evidence it is part of a larger series of magazines featuring action cards.
- AthlonSports.com offers NFL Preview magazines and collectible sports trading cards, presumably under the same trademark.
- Dean’s Cards offers Sporting News, Sports Illustrated and other sports magazines and Upper Deck brand hockey trading cards. Dean’s Cards does not appear to be related to any of the magazine or trading card companies, nor do they appear on this record to be related to each other.
- Topps offers various collectible sports magazines and comic books by different publishers and Topps sports trading cards. There is no evidence that Topps is related to any of the publishers of the magazines it provides. There is evidence of a collaboration between Sports Illustrated and Topps for a series of baseball cards offered under both of their marks, but not a single trademark. There is no evidence that this collaboration is part of a larger series of combined magazine and trading card offerings.
- Applicant’s own 2020-21 NBA Hoops Basketball magazine featured an insert with a 20-card set of SLAM magazine covers presented as trading cards, under both of their trademarks. There is no evidence this collaboration is part of a larger series of offerings by the two companies.

- Ab D. Cards offers baseball books, guides, yearbooks and magazines as well as sports trading cards. However, there is no evidence that the goods Ab D. Cards offers are under its own brand or any single brand or trademark.
- ComC offers sports trading cards and non-sport collectible cards under several brands and trademarks including Panini (Applicant), Topps, Fleece and Impal, and collectible issues of Sports Illustrated magazines. There is no evidence of record that these providers of magazines and trading cards are related entities.
- Fanatics Authentic offers collectible copies of Sports Illustrated and ESPN magazines and Upper Deck collectible sports trading cards. There is no evidence these companies are related.
- Steiner Sports Memorabilia offers collectible copies of Sports Illustrated magazine and Applicant's sports trading cards. There is no evidence these companies are related.
- AU Sports Memorabilia offers sports trading cards and sports magazines under the same trademarks.
- Dave & Adam's Card World offers Hit Parade sports trading cards and collectible copies of Sports Illustrated and Sport magazines. These companies do not appear to be related on this record.
- Steel City Collectibles offers autographed copies of Time and Sports Illustrated magazines and Upper Deck collectible sports trading cards. There is no record evidence these companies are related.

This evidence demonstrates that as many as five third parties offer both Applicant's goods and the goods identified in the cited registration under the same trademarks and trade names. The Examining Attorney's evidence further shows collaborations between magazines and trading card companies, including Applicant, to provide magazines featuring trading cards.

Applicant argues¹⁴ “these examples are one-time collaborations between card manufacturers and magazine publishers and do not occur on a regular basis.” There is no evidence to definitively indicate whether these offerings are one-time collaborations or part of a larger series, and Applicant’s “assertions are unsupported by sworn statements or other evidence, and ‘attorney argument is no substitute for evidence.’” *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, *14 (TTAB 2019) (quoting *Cai v. Diamond Hong*, 127 USPQ2d at 1799 (internal quotation omitted)). Nonetheless, we agree with Applicant’s argument, as supported by the limited evidence of record,¹⁵ that “when these companies collaborate to create joint promotional materials, the final product includes both companies’ house brands.” As discussed above, the record evidence supports Applicant’s assertion that such collaborations are co-branded and indicate the separate sources of the goods, not a single source.

The remainder of the third-party uses appear to offer sports magazines and sports or collectible trading cards under different trademarks, house marks and brand names. These examples fail to demonstrate that Applicant’s collectible and sports trading cards emanate from the same source as the magazines featuring sports information identified in the cited registration. These goods may be offered on the same websites; however, the evidence shows they are offered under different trademarks. The Examining Attorney cites to no authority for the proposition that

¹⁴ 8 TTABVUE 6.

¹⁵ 8 TTABVUE 6-7.

websites offering the relevant goods under different marks is sufficient to support a finding that consumers are likely to view these goods as emanating from a common source.

The Examining Attorney also introduced into the record with the October 6, 2020 first Office action,¹⁶ copies of six live, use-based, third-party registrations for marks identifying, inter alia, trading cards and sports magazines. The following examples are illustrative:

- HUSTLE LOYALTY RESPECT (Reg. No. 4923112) identifying magazines and newspapers concerning sports entertainment; trading cards;



- (Reg. No. 6123597) identifying magazines featuring information in the field of soccer; collectible trading cards and sports trading cards; and
- SKOL (Reg. No. 5973446) identifying magazines relating to football; trading cards.

As a general proposition, although use-based, third-party registrations alone are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless may have some probative value to the extent they may serve to suggest that the goods are of a kind that emanate from a single source. *See In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert*

¹⁶ At 25-42.

Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

In this case, the totality of the website and third-party registration evidence falls rather short of demonstrating that consumers would expect sports trading cards and magazines featuring sports information could emanate from the same source.

With regard to the third *DuPont* factor, the similarity of the trade channels in which the goods are encountered, the above website evidence demonstrates that five third parties provide sports trading cards and magazines featuring sports information on their websites under the same trademarks. The record further suggests that six third parties have registered marks identifying both goods.

As discussed above, the evidence of record falls short of demonstrating that both Applicant's goods and the registrant's goods may be encountered by the same classes of consumers under the same marks in common trade channels. The evidence of record shows a mere five third-party websites of entities providing trading cards and sports magazines under the same mark, and six third-party registrations for marks identifying, inter alia, trading cards and sports magazines. Collectively, this is insufficient to show consumers are likely to encounter these goods in the same channels of trade.

Due to insufficient evidence, we find that the *DuPont* factors of the relatedness of the goods, channels of trade and target consumers weigh against a finding of likelihood of confusion.

E. Consumer Sophistication and Conditions of Sale

Applicant's unsupported argument that the involved goods would be purchased by sophisticated consumers is not persuasive. There is nothing in the identification of goods to indicate that the sports magazines and sports trading cards are restricted to rare or exclusive collectibles, offered at only high prices and purchased only by consumers with specialized knowledge. The record shows rare, vintage or autographed trading cards and magazines offered at high prices and more modestly priced magazines, cards and card sets. Both presumably are available to any interested buyer.

Even if we accept, in considering the fourth *DuPont* factor, Applicant's assertion that the involved goods may be purchased by sophisticated consumers, even careful purchasers are not immune to source confusion. As stated by the Federal Circuit, "[t]hat the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods. 'Human memories even of discriminating purchasers ... are not infallible.'" *In re Rsch. and Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) quoting *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970).

Therefore, the fact that the purchasers may exercise care before purchasing these goods does not mean there can be no likelihood of confusion. In the present case, the identity of the marks on the one hand and the absence of sufficient evidence of relatedness between the goods on the other outweigh any sophisticated purchasing

decision. *Cf. HRL Assocs., Inc. v. Weiss Assocs., Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, *Weiss Assocs., Inc. v. HRL Assocs., Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods.)

This *DuPont* factor is neutral.

F. Conclusion

When we consider and weigh the evidence of record and the relevant likelihood of confusion factors, *In re Charger Ventures LLC*, 65 F.4th 1375, 2023 USPQ2d 451, at *7 (Fed. Cir. 2023) (“[I]t is important ... that the Board ... weigh the *DuPont* factors used in its analysis *and* explain the results of that weighing.”), we conclude that consumers familiar with goods identified in the cited registration offered under its mark would be unlikely to believe, upon encountering Applicant’s mark, that the goods originated with or are associated with or sponsored by the same entity. While the marks are identical, the relative weakness of the cited mark and insufficient evidence that the goods are related or will be offered in common trade channels mitigate against a finding of likely confusion. Sophistication of consumers is neutral on this record.

Decision: The refusal to register Applicant’s mark PLAYBOOK under Section 2(d) of the Trademark Act is reversed.